United States Court of Appeals for the Second Circuit



REPLY BRIEF

76-1262

To be argued by MICHAEL I. SALTZMAN

In The

United States Court of Appeals

For The Second Circuit

UNITED STATES OF AMERICA.

Plaintiff-Appellee,

VS.

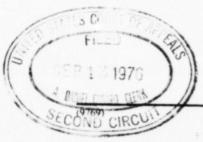
HARVEY OST.

Defendant-Appellant.

REPLY BRIEF FOR DEFENDANT-APPELLANT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

V

Docket No. 76-1262

HARVEY OST,

Defendant-Appellant.

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REPLY BRIEF

The defendant-appellant replies to the Government's brief as follows:

1. As the court below observed, the Government produced "little direct evidence" that the defendant received the proceeds of the Feferholtz account for his own use. These proceeds constituted the short-term capital gain with respect to which the indictment charged defendant had evaded income tax and made a false statement. To bolster its case on the Feferholtz account, the Government attempted to show that defendant had evaded tax on

three other specific items of income.* It characterized these three items of income as defendant's share of the proceeds of a scheme by the principals of WOH to evade corporate and personal income taxes by diverting corporate assets to themselves. The income the Government attributed to defendant was (1) the proceeds of the sale of a Ceneral Atronics bond in the amount of \$1,027; (2) out-of-area rent in the amount of \$4,966.67; and (3) one third of a \$16,060 item denoted underwriting expenses on the WOH books. The defendant's position was that if in fact he received the proceeds of the sale of the General Atronics bond, the omission of the amount from his tax return was inadvertent, but that he doubted the bond had been sold; that he received \$3,600 of out-of-area rent expense which was a legitimate reimbursement of expenses actually incurred on behalf of WOH and not taxable to him; and that he never received either directly or indirectly any portion of WOH payments charged to "underwriting expense." The Government describes these matters in considerable detail in its statement of facts (Br. 5-8 and 10-12) and urges that the "substantial evidence" of these alleged corporate

^{*}The Government also contended defendant evaded tax by fraudulently claiming a \$600 dependency exemption for his mother. Defendant did not concede he was not entitled to this exemption, but stated the exemption was mistakenly claimed if he were not entitled to the exemption.

diversions supports the finding that the proceeds of the Feferholtz account constituted "his" income (Br. 18, 19). Unless this Court happens to read a footnote on page 15 of the Government's brief, however, it would not realize that these additional alleged evasions played absolutely no part in the determination of the trier of fact, the court below sitting without a jury. Although the Government portrays this proferred evidence and argument so prominently in its brief here, Judge Cannella made no findings of fact on these matters and relegated the Government's argument to a footnote. The footnote reads as follows (218a):

3. In finding the defendant guilty, the Court relies solely upon the evidence regarding the Feferholtz account. The Court is not persuaded beyond a reasonable doubt that the other alleged evasions were wilful.

Surprisingly, then, the Government seeks to justify the decision of the court below here in substantial part on the very grounds which played literally no part in that decision. Moreover, based on the court's finding, it appears that the Government's version of the facts was not accepted as true.

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2. Even if this Court considers the evidence of other alleged evasions which played no part in the trial court's decision, the evidence supports the very point that defendant makes in this appeal. Defendant has argued that at no point did he have unfettered control of the proceeds of the Feferholtz

account. The evidence with respect to the General Atronics bond, the out-of-area rent and underwriting expenses, it is argued, shows a pattern of dividing corporate diversions among the three principals on an equal basis (Br. 7). But even if defendant received 1/3 of these amounts with the knowledge of the other principals of WOH, that hardly proves he received 100% of the proceeds of the Feferholtz account without their knowledge. On the contrary, until actual disbursement of the so-called corporate diversions, the "pattern" indicates that (1) the share of any one of the principals of WOH was subject to the control of the other two; (2) contrary to the Government's suggestion (Br. 18) there were no "personal" diversions; and (3) the defendant did not have an unfettered control of WOH funds. Moreover, the Government's argument that defendant's embezzled stock from WOH which Weinberg then charitably traded for him runs headlong into its corporate diversion pattern. The "pattern" would suggest that Hayton and certainly Weinberg would not have permitted defendant to divert the proceeds of the Feferholtz account about which they had full knowledge without getting their "share." Furt ermore, while the Government is quick to argue the weight of a negative inference drawn from a disbelieved explanation, it apparently would reject such a negative inference drawn from its own failure to produce circumstantial evidence that defendant had received the Feferholtz account proceeds. This

failure to produce circumstantial evidence (as the Government frequently does in tax evasion cases) is especially significant in light of the "little direct evidence" of income realization and the uncontradicted testimony that \$50,000 in the form of currency had been kept as security for repayment of a corporate loan.

3. The Government argues the evidence was "more than sufficient to support the Court's judgment . . . " This amounts to adversarial hyperbole in the face of the trier of fact's own finding that the Government had produced "little direct evidence" that defendant had received the proceeds of the Feferholtz account. But the difficulty with the Government's argument that defendant was the person taxable or the Feferholtz account proceeds is its misunderstanding of the tax principles dealing with choice of taxable person. Thus, the Government repeats a statement of the Supreme Court in Helvering v. Horst, 311 U.S. 112, 118 (1940), that "the power to dispose of income is the equivalent of ownership of it." But in Horst, the owner of negotiable bonds was held to have realized interest income although prior to the interest payment he had detached negotiable interest coupons and delivered them as a gift to his son. It was critical in the case that the donor-father had not parted with ownership of the income-producing property (the bond). Similarly, here ownership of the stock which was traded is critical to a finding that defendant is taxable on the Feferholtz

account proceeds. Clearly, the traded stock was WOH stock. Recognizing this difficulty, the Government now argues that defendant stole the stock from WOH (Br. 19). Again, however, the evidence is that the gains which defendant allegedly diverted to his own use were produced not by defendant but by Weinberg, the WOH trader who traded no other account except the WOH trading account. It is simply incredible that defendant embezzled stock from the WOH trading account, prevailed upon Weinberg to trade the account for him producing substantial gain without paying a commission or other benefit to Weinberg, and then withdrew the proceeds. The evidence, on the contrary, establishes that WOH was the owner of the stock which Weinberg traded as he did the corporate trading account. And to the extent that choice of taxable person depends upon ownership, WOH and not the defendant was the taxable person. The other evidence on which the Government would support the findings of the court below is similarly inconsistent with defendant's guilt of the crime charged. Choice of taxable person is not founded on such formalities as the name of an account, a book entry, or the name of the book in which the account is kept. Nor is "receipt" the equivalent of income-realization. A corporate treasurer does not himself realize income when he receives corporate funds, unless by some act he asserts control over the funds inconsistent with the corporation's ownership. Here, there is no evidence that

defendant did anything with the proceeds of the Feferholtz account, except what he and the other principals say he did--to repay in part the loan the Cohan Estate had made to WOH.

4. The Government asserts that the court below was entitled to draw a negative inference from the disbelieved testimony of the defendant (Br. 16-17). This assertion utterly fails to recognize the requirement of the Supreme Court mandated in Smith v. United States, 348 U.S. 147, 156 (1954), that there be substantial independent evidence of the guilt of a defendant, apart from any admission he may have made. Circumstantial evidence such as demeanor is in the nature of an admission. this Court says that incredibility of an explanation may furnish "further support for a contrary inference," therefore, this can only be correct if absent the contrary inference, there is substantial independent evidence of guilt. In the Mariani and Arcuri cases, cited by the Government, the evidence apart from the credibility of the defendants' explanation, was clearly substantial. But this is precisely where this case differs from Mariani and Arcuri. Here, the evidence, apart from the credibility of defendant's explanation and his other bad acts, is insubstantial. The case of Dyer v. MacDougall stands for precisely the opposite proposition for which it 's cited, as its citation in Archi indicates. In Dyer v. MacDougall, while Judge Hand recognized that a jury could draw such a negative inference,

he stated (consistently with his opinion in <u>Pariso</u> v. <u>Towse</u>

discussed in defendant's opening brief at page 28) that a verdict

supported solely by this "evidence" would have to be set aside.

Otherwise he said meaningful appellate review would be prevented

since demeanor evidence has "disappeared." 201 F.2d at 269.

See also, Maguire, Weinstein, Chadbourn and Mansfield, Evidence,

Cases and Materials (5th Ed.) pp. 660-661.

Respectfully submitted,

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UNITED STATES OF AM ERICA,

Plaintiff-Appellee, - against -

HARVEY OST.

Defendant-Appellant.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

NEW YORK

I, Reuben A. Shearer being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at 211 West 144th Street, New York New York 10030 day of Sept. 1976 at 1 St. Andrews Plaza New York, N. Y.

deponent served the annexed

That on the

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reply brief

upon

Robert Fiske.

the PKINKE COPELE in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein.

Sworn to before me, this 13th day of September Beth A. Klich

BETH A. HIRSH NOTARY PUBLIC, State of New York No. 41-4623156 Qualified in Queens County Cammission Expires March 30, 1978

Reuben Shearer